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Allen K. Young; Young, Backlund & Carter; Attorneys for Plaintiff-Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JANA C. CHRISTIANSEN, :
Plaintiff/Respondent, :
vs. : Case No. 18,132
KENT CHRISTIANSEN, :
Defendant/Appellant. :

--ooo0ooo--

RESPONDENT'S BRIEF

--ooo0ooo--

Appeal From the Judgment of the
District Court of the Fourth Judicial District
In and For Utah County, State of Utah
Honorable George E. Ballif, Judge

--ooo0ooo--

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FILED

APR 15 1982

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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RESPONDENT'S BRIEF

--ooo0ooo--

STATEMENT OF THE KIND OF CASE

This is a request for modification of a decree of divorce in which the plaintiff seeks increased child support and the defendant seeks elimination or reduction of alimony.

DISPOSITION IN LOWER COURT

An order to show cause hearing resulted in the Court's decision to award to the plaintiff increased child support, to continue the alimony stipulated in the original decree, and to charge the defendant with attorney's fees and costs, from which decision the defendant appeals.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a judgment affirming the decision of the trial court.

STATEMENT OF FACTS

The parties in this case were divorced from each other and neither has since remarried.

Defendant is a dentist specializing in endodontics or root canal therapy (R. 6, 51). As of the date of the hearing, he was apparently the sole Utah practitioner of this specialty south of Salt Lake City (R. 6). His nine and one-half year background of higher education includes four years each of undergraduate school and dental school and an additional year and one-half of study of endodontics.

Plaintiff is employed by Provo City Schools as a school counselor and has a master's degree in educational psychology (R. 6, 7).

Plaintiff and defendant were married June 1, 1972, the year that defendant was awarded his bachelor's degree and entered dental school (R. 51). The date of their divorce was July 17, 1979 (R. 4). A modification hearing was conducted September 3, 1981, pursuant to plaintiff's order to show cause seeking increased child support and defendant's counter-petition for elimination or reduction of alimony.

Plaintiff had signed an employment contract with her present employer about a month before the divorce decree and began working August 21, 1979 (R. 6, 7, 27). She was being paid once a month, receiving a net sum of approximately \$525.00 per month (R. 16).

Defendant had established a practice in 1978 when his schooling was completed (R. 51, 52). After the divorce he organized a professional corporation that paid his salary and funded a pension

and profit-sharing plan for his future benefit (R. 56, 61, 62). His testimony regarding his income was based upon his tax records for the year 1980, during which year he had allocated to himself a salary of \$30,538.00 and had earned interest income of \$5,300.00 (R. 58, 59). His corporation had come into existence during 1980 and thus he had no verified record of its gross profits, but estimated these to be about \$140,000.00 (R. 60).

Plaintiff was awarded custody of the two minor children born of the marriage. The elder was three and one-half years old at the time of the divorce and almost six and attending school at the time of the hearing. The younger child was one year old at the time of the divorce and three and one-half and attending pre-school when the hearing was conducted (R. 9, 36).

Prior to the divorce, the family had been renting a home belonging to another family who lived elsewhere temporarily. When the owners returned to their home, plaintiff purchased a condominium in American Fork. The favorable rental terms negotiated with the owners in return for "housesitting" were superseded by housing payments that represented a significant increase in plaintiff's living expenses (R. 49, 21). As a result of the move, plaintiff also purchased a refrigerator, a clothes washer and a dryer, appliances she had not owned before (R. 18, 20).

In June, 1980, maintenance expenditures prompted plaintiff to trade the 1975 Ford she obtained in the property settlement and used to commute from American Fork to her Provo job for a newer car, a year-old Chevrolet (R. 29). After that date, her automobile insurance rates increased considerably (R. 18).

A loan from her employment credit union financed the automobile, the refrigerator and curtains for the condominium, with payments of \$220.00 being deducted from the \$525.00 she earned monthly (R. 18). Loan payments for the later purchase of the washer and dryer amounted to \$65.00 a month, and there was an \$800.00 debt for credit purchases of gasoline (R. 20, 21).

Expenses for the children had increased with their advancing ages, growth, interests, and activities. Child care amounting to \$250.00 per month was an expense related primarily to plaintiff's employment, but also to the rheumatoid arthritis from which she suffers.

Plaintiff was receiving \$275.00 per month per child in child support payments, and she asked that this be increased to \$600.00 per month per child. She also received \$650.00 per month alimony and made no request for any change with regard to that figure.

Defendant petitioned for reduction or elimination of plaintiff's alimony award based upon the fact that she was employed. His increased expenses were primarily attributable to his leaving the rented offices in the medical complex in which he had first established his practice and purchasing professionally decorated offices in a new complex in a prime location (R. 52, 53, 10). He has also added employees to his staff (R. 11).

ARGUMENT

THE EVIDENCE IN THIS CASE FAILS TO SUPPORT A CLAIM OF JUDICIAL ABUSE OF DISCRETION.

It must be reasserted that a court of review does not without weighty evidence of inequity overturn the considered decision of

the trial court. As this court pronounced in another divorce action, Jackson v. Jackson, 617 P.2d 338 (Utah 1980):

It is to be observed at the outset that this court is not at liberty to undertake an independent retrial of all factual issues arising in a suit in equity . . . the trial court's disposition of the matter is entitled to a certain deference, and should be disturbed only where such is necessary to prevent manifest injustice.

Again, in Jorgensen v. Jorgensen, 599 P.2d 510 (Utah 1979):

"Only where trial court action is so flagrantly unjust as to constitute an abuse of discretion should the appellate forum interpose its own judgment." With good cause, a party appealing a prior decision has a difficult burden to meet in establishing that such flagrant, manifest injustice has resulted.

Defendant's first point states that the trial court abused its discretion in failing to decrease plaintiff's alimony as a result of her increased income. While it is true that plaintiff had no income at the time of the entry of the decree of divorce, she did at that time have a contract with her present employer and began working during the month following the decree. From then to the present her salary has not increased from the original contract amount except for a 4% cost of living increment (R. 15). Her efforts to contribute the family living expenses are commendable in that each morning she must combat stiff joints and inability to maneuver that results from her arthritic condition and must still prepare herself for a workday beginning at 8:00 a.m. (R. 33, 34). Although six to twelve doses of medication daily enable her to function, the debilitating fatigue that she experiences would prevent full-time employment even if it were available to her. In fact, her testimony is that her employer has never offered her a

full-time job and is unlikely to do so given the current cutback in school funding (R. 32, 33). The stipulation in the original settlement provided that future increases in alimony "be based solely upon plaintiff's economic needs without any regard whatsoever to a possible increase in defendant's income status." (Appendix "B"--Stipulation and Property Settlement Agreement).

In order to have violated the stipulated agreement, the trial court would have had to increase the grant of alimony on the basis of the increase in defendant's income. Certainly the court did not misuse its authority by not granting any increase for any reason.

In his Point II, the defendant urges an abuse of discretion in the court's award of increased child support payments on the basis that the plaintiff's living expenses and the defendant's gross income were improperly considered.

In the first part of Section 30-3-5, the Utah Code Annotated, 1953, as amended, provides:

(1) When a decree of divorce is made, the Court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable. The court shall have continuing jurisdiction to make such subsequent changes or new orders with respect to the support and maintenance of the parties, the custody of the children, and their support and maintenance or the distribution of the property as shall be reasonable and necessary . . . (Emphasis added).

In Wright v. Wright, 586 P.2d 443 at 445 (Utah 1978), the court commented on this statutory duty as follows:

Section 30-3-5 further provides that support orders may be subsequently modified whenever reasonable or necessary. Ordinarily, an award for child support will be modified when there is a material change of circumstances of the parties involved. We have previously held that such changes occur

when there is an increase in the father's ability to support his children, or where the children grow older and require additional support to properly maintain them.

In fact, both of these conditions attesting to materially-changed circumstances apply in the instant case, as the record amply evidences.

Increase in Father's Ability to Support His Children

In the course of the marriage, defendant gained expertise in his field by earning a degree in dentistry and completing subsequent study in his specialty. During his student days, defendant's income was admittedly negligible (R. 52) but, when he began his practice, about fourteen months prior to the decree of divorce, his income escalated to the extent that, despite initial outlays for offices and equipment, he was soon obliged to employ such measures as professional incorporation and pension and profit sharing planning to minimize his tax liability (R. 62). As stated in its decision, the trial court found an increase of approximately \$19,000.00 in defendant's gross earnings in the 1980-81 period (Appendix "A"--Decision). The rarity of practitioners of his specialty gives every indication that his success and prosperity will continue. In Wright, quoted above, the court expressed the logical assumption that any increase, received by the father "should be shared, at least proportionately, with his children in the form of increased support."

Increased Expenses of Support as Children Grow Older

The two children involved here were very young at the time of the divorce, and that they have since become more expensive to support and maintain is undisputed. As the defendant has shown no

disposition to deny them the benefits of such activities as lessons in swimming, dance and gymnastics, it is difficult to comprehend his labeling as "discretionary" family expenditures for a refrigerator, a clothes washer, a dryer and dependable means of transportation.

Child care expenses are essential if plaintiff is to continue her employment. However, as school systems continue to operate with tighter budgets, plaintiff has but poor prospects of salary increases that will compensate for growing expenses related to the children's advancing ages, school attendance, and activities.

Not only is judicial consideration of such factors as plaintiff's living expenses and defendant's gross income not an abuse of discretion, but these very factors have been held to show a material change of circumstances necessary to an award of increased child support.

The court in Mitchell v. Mitchell, 527 P.2d 1359 at 1360 (Utah 1974) spoke of a "presumption of validity" accorded the trial court in a divorce action with the same authority being conferred upon the trial court to make subsequent changes with respect to support and maintenance and summarized its deliberations as follows:

The trial court found that since the time of entry of the original decree, defendant's earnings had increased from a base salary of \$13,196.00 per year plus bonus to a base salary of \$19,155.00 per year; that the cost of living had increased considerably; and that plaintiff's living expenses for herself and her children had increased to an amount in excess of \$800.00 per month. The trial court concluded that there had been a substantial change of circumstances with a substantial increase in the cost of living, which justified an increment in the award.

The Court affirmed and awarded costs to plaintiff.

Plaintiff's third point regarding maintenance of health and medical insurance is a self-confessed moot point. Plaintiff's attorney reminded the defendant that plaintiff had never filed a claim on the only policy that defendant carried that provided medical coverage:

Q (By Mr. Young): Now, that insurance policy really didn't cover her legally anyway; did it? You weren't allowed to claim her after your divorce; were you? She had to be a dependent?

A (By Mr. Christensen): In terms of the policy, it was for a spouse and so actually it was a moot point because, since there was a \$1,000.00 deductible, she got up to like hundreds and hundreds of dollars but we never crossed over there so it never had to be filed but the policy was intact.

(R. 75-76).

Finally, with regard to Point IV, there is no basis in the record to characterize the award of modest attorney's fees to plaintiff in the sum of \$200.00 as an abuse of discretion.

CONCLUSION

In review, defendant has claimed that the trial court abused its discretion by its resolution of the issues and has set forth five points, detailing each of the errors claimed. These may be summarized as follows: First, the continuation of plaintiff's alimony was an abuse of discretion in view of her employment; second, the award of additional child support was an abuse of discretion in that consideration was given to plaintiff's increased living expenses and to defendant's present gross income as compared with his past net earnings; third, failure to eliminate a requirement of medical insurance coverage of plaintiff was an abuse of discretion; and, finally, award of attorney's fees to plaintiff was an abuse of discretion.

No abuse of discretion was committed by continuing plaintiff's original alimony, although she had added to her responsibilities as custodial parent by working three days a week as a school counselor. Plaintiff did not seek any increase in alimony and the trial court did not award an increase; therefore, the divorce stipulation regarding future increases is not at issue.

The trial court properly considered plaintiff's augmented living expenses and defendant's increased ability to support his children in ruling that child support contributed by defendant should be increased from \$275.00 per month per child to \$450.00 per month per child. The court took care to explain the necessity of examining defendant's gross income since "(h)is present mode of doing business through a personal corporation and payment of a salary is not indicative of the real earnings of the defendant." (Appendix "A"--Decision).

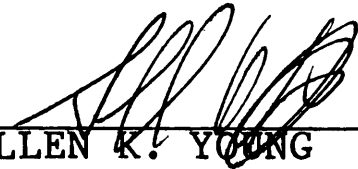
The questions of health and medical insurance and attorney's fees raised by defendant are no more efficacious than the preceding arguments in establishing a judicial abuse of discretion in this matter.

Under Utah law, a divorce court sits as a court in equity so far as child custody, support payments and the like are concerned . . . In both the formulation of the original decree and any modifications thereof, the trial court is vested with broad discretionary powers, which may be disturbed by an appellate court only in the presence of clear abuse thereof. Despain v. Despain, 610 P.2d 1303 at 1305, 1306 (Utah 1980).

It is not the role of the appellate forum in such cases to evaluate the sagacity of the trial court's decision, being based as it is on shadings of fact and circumstances unavailable to the reviewing court. If the decision rests properly within the bounds of judicial discretion imposed by law, our inquiry is at an end. McCrory v. McCrory, 599 P.2d 1248 at 1250 (Utah 1979).

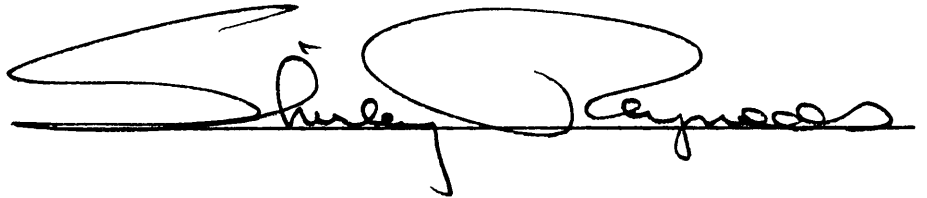
The trial court presented its findings in a carefully detailed and reasoned decision, a decision well within the bounds of judicial discretion.

RESPECTFULLY SUBMITTED this 13 day of April, 1982.



ALLEN K. YOUNG
Attorney for Respondent
350 East Center
Provo, Utah 84601

I HEREBY CERTIFY that I mailed a copy of the foregoing to Craig M. Snyder, Attorney for Defendant-Appellant, 120 East 300 North, Provo, Utah 84601, postage prepaid, this 14th day of April, 1982.



Craig M. Snyder

APPENDIX "A"

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JANA C. CHRISTIANSEN,

Civil Case No. 51,095

Plaintiff,

vs.

KENT CHRISTIANSEN,

DECISION

Decision.

APPENDIX "A"

This matter came before the Court on the 3rd day of September, 1981, Allen K. Young, Esq., appearing for the plaintiff and Craig M. Snyder, Esq., appearing for the defendant. Plaintiff first applied to the Court for an Order to Show Cause why the support provision of the Decree of Divorce should not be increased for the two minor children of the parties, to which the defendant has counter-petitioned for a reduction of the alimony or child support awarded by the Decree of Divorce, which was stipulated to by the parties. The parties presented their evidence and copies of the defendant's income tax returns were secured for the Court's inspection, and the Court having taken the matter under advisement and having fully considered same, now enters the following:

DECISION

The Court finds that the expenses of plaintiff in rearing the minor children have increased by virtue of inflation since the entry of the Decree herein on July 17, 1979, although the expenses of the minor children were not established by any findings of fact or stipulations on file herein at the time the Decree was entered.

The Court further finds that there have been other increases in that the plaintiff has acquired new living facilities for herself and the children and having obtained employment has an increased expense of \$250.00 per month for child care. Other expenses such as dancing and other lessons for the children are

APPENDIX "A"

given only minimal weight by the Court in arriving at the increase in child support that is justifiable under the changed circumstances of the children's needs.

In addition to the foregoing, the defendant has increased his gross income considerably since the Decree of Divorce was entered when his net income was approximately \$30,000.00 per year. His present mode of doing business through a personal corporation and payment of a salary is not indicative of the real earnings of the defendant. This especially true in the 1980-81 period since 1979 included a \$41,000.00 loss item which does not appear in subsequent returns. In addition, an increase of approximately \$19,000.00 has been established in the gross earnings in the 1980-81 period.

Based upon the above and foregoing findings, and upon the finding in the Decree of Divorce that only the plaintiff's economic needs, without regard to defendant's income, is the sole basis for increase in alimony and the further finding by the Court that plaintiff's personal needs have not materially increased in that she has now obtained employment and is providing partially for her own support, the Court concludes as follows:

1. That the child support payable by the defendant to plaintiff for the support and maintenance of his two minor children should be increased the additional sum of \$175.00 per month per child, making the total sum per month of \$450.00 per month per child, the same payable semi-monthly together with alimony at such time as in the original Decree provided.

2. The Court further concludes that a sufficient change of circumstance has not been shown to justify the reduction or elimination of the alimony paid by defendant to plaintiff, and the amount provided in the original Decree shall continue.


3. The Court further finds that the defendant should pay to the plaintiff for the use and benefit of her attorney, Allen K. Young, the sum of \$200.00 for his services herein, which the Court

APPENDIX "A"

finds *is* reasonable. Defendant to pay the costs incurred herein.

Counsel for the plaintiff is directed to prepare an appropriate amendment to the Decree of Divorce consistent with the foregoing Decision.

Dated at Provo, Utah County, Utah this 5th day of October, 1981.


GEORGE E. BALLIF, JUDGE

WAYNE B. WATSON, OF
GROW & WATSON
Attorneys for Defendant
1325 South 800 East
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Telephone: 225-8300

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH

JANA C. CHRISTIANSEN,

Plaintiff,

vs.

KENT CHRISTIANSEN,

Defendant.

: STIPULATION AND PROPERTY
SETTLEMENT AGREEMENT

:
: Civil No. 51,095

:

WHEREAS, the Plaintiff above named has commenced an action
for divorce against the Defendant, and

WHEREAS, it is the desire and intention of the parties
hereto to dispose of their property rights and other rights and
obligations arising out of their marriage in the event a Decree
of Divorce is granted by the Court on the Plaintiff's Complaint.

NOW, THEREFORE, in consideration of the mutual execution
of this Agreement, the parties hereto hereby Stipulate and Agree,
subject to the approval of the above-entitled Court, that in the
event a Decree of Divorce is entered on the Plaintiff's Complaint,
that the said Decree may contain the following provisions and
that the same may be incorporated therein.

1. The Defendant hereby agrees that the Answer previously
filed in this matter may be withdrawn and requests the Court to
treat this matter as a default, requiring no further notice to
him.

2. The Plaintiff shall be awarded the care, custody and
control of Alicia Christiansen and Chad Christiansen, the two
minor children of the parties hereto, subject to the rights of
the Defendant to visit with said children at reasonable times and
places, and under reasonable circumstances.

3. The Defendant shall pay to the Plaintiff the sum of
\$275.00 per month per child, child support, to assist in the

APPENDIX "B"

support and maintenance of each of the minor children of the parties hereto, together with \$650.00 per month alimony. Said payments shall be made in equal semi-monthly installments of \$600.00 each, on or before the 1st and 15th days of each month commencing August 1, 1979, and continuing thereafter on the 1st and 15th days of each month until the Court otherwise orders.

4. The Defendant shall pay and discharge any and all outstanding debts and obligations of the parties hereto incurred prior to their separation and shall hold the Plaintiff harmless from further liability thereon.

5. That the Defendant shall maintain hospital and medical insurance policies in full force and effect on the Plaintiff and the minor children of the parties with an annual deductible not to exceed \$100.00. It is expressly understood that in the event Plaintiff remarries, Defendant will not be responsible for maintaining a hospital and medical insurance policy for her benefit.

6. The Plaintiff shall be awarded as her sole and separate property the 1975 Ford Mustang automobile, together with any and all personal property in her possession as of the date of this Stipulation.

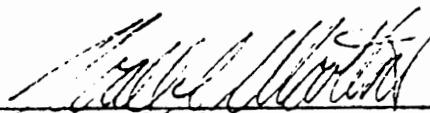
7. The Defendant shall be awarded as his sole and separate property the 1978 Oldsmobile Cutlass automobile, together with any and all personal property in his possession as of the date of this Stipulation, including all business property accounts and equipment. In lieu of any claims upon the business or any other property acquired by the parties during their marriage, except for such properties as the Plaintiff has in her possession, the Defendant shall pay to her the sum of \$16,000.00 cash upon approval of this Stipulation by the Court.

8. The Defendant shall pay to the Plaintiff the sum of \$375.00 for the use and benefit of her attorney herein, together with costs in the amount of \$25.00.


9. The parties further stipulate that they hereby request the Court to make a finding of fact that the Plaintiff presently has no income, and that future increases in alimony shall be based solely upon Plaintiff's economic needs without any regard whatsoever to a possible increase in Defendant's income status.

10. Each of the parties acknowledge that they have read the foregoing Stipulation and Property Settlement Agreement and understand the contents thereof; that there have been no promises or representations made by either party to the other to induce the execution of this Agreement which are not specifically set forth herein.

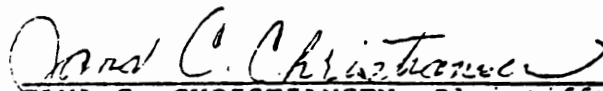
DATED this 13 day of July, 1979.



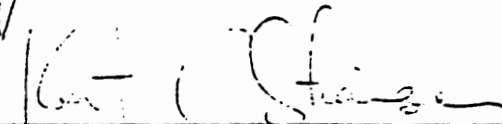
NOALL T. WOOTTON
Attorney for Plaintiff



WAYNE B. WATSON,
Attorney for Defendant



JANA C. CHRISTIANSEN, Plaintiff



KENT CHRISTIANSEN, Defendant